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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,

Petitioner,

VS.

SNYDER'S DRUG STORES, INC.,

Respondent.

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF NORTH DAKOTA**

APPENDIX

A. WILLIAM LUCAS

Counsel for Petitioner

411 North Fourth Street

Post Office Box 1398

Bismarck, North Dakota 58501

A. WILLIAM LUCAS

CONMY, CONMY, ROSENBERG & LUCAS

Counsel of Record

Address of:

411 North Fourth Street

P. O. Box 1398

Bismarck, North Dakota 58501

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CHRONOLOGICAL LIST OF DATES OF PLEADINGS, HEARINGS, AND ORDERS

- | | |
|-------------------|---|
| January 25, 1971 | — Application for Pharmacy Permit |
| March 22, 1971 | — Investigation Report, Administrative Board Meeting, and Motion to Deny Application for Permit, Administrative Findings of Fact, Conclusions of Law, and Order |
| April 12, 1971 | — Notice of Appeal to District Court |
| November 16, 1971 | — Motion for Summary Judgment |
| December 3, 1971 | — Hearing on Motion for Summary Judgment |
| December 30, 1971 | — Findings of Fact, Conclusions of Law, and Order for Judgment of District Court |
| January 6, 1972 | — Summary Judgment |
| April 4, 1972 | — Notice of Appeal to North Dakota Supreme Court |
| October 31, 1972 | — Order of North Dakota Supreme Court |
| November 29, 1972 | — Order of North Dakota Supreme Court denying Petition for Rehearing |
| December 4, 1972 | — Notice to Appellant of Order denying Petition for Rehearing |
| January 4, 1973 | — Judgment on Remittitur |
| February 24, 1973 | — Petition for Certiorari filed February 24, 1973 with United States Supreme Court |
| April 23, 1973 | — Certiorari Granted |

APPLICATION FOR PERMIT

DPS-116-4-62-Homestead

3

Application For Permit

Do Not Write Here

TO OPERATE A PHARMACY OR DRUG STORE IN NORTH DAKOTA

(This application must be accompanied with the legal fee of Thirty (\$30.00) Dollars and mailed before July 1)

TO THE NORTH DAKOTA STATE BOARD OF PHARMACY,
AL DOERR, SECRETARY
1208 S. HIGHLAND ACRES ROAD
BISMARCK, NORTH DAKOTA 58501

Application is hereby made by SNYDER'S DRUG STORES, INC.

Name of applicant

215 East Excelsior Avenue

Street and number

Hopkins, Minnesota 55343

City or Town

for registration of a pharmacy and permit to conduct same at 715 East Broadway

Street and number, lot and block

Bismarck

City or Town

Burleigh

County

North Dakota.

who presents the following statements in support of right to be granted registration and permit and represents that if such permit is granted, such place will be conducted in full compliance with Chapter 103, S. L. of 1937, with existing laws, and with the regulations of the Board of Pharmacy. If any statements hereinafter made are found to be false, the Board of Pharmacy is authorized to cancel and revoke the permit issued upon this application.

1. Name or title under which the Pharmacy is to be carried on:

SNYDER'S DRUG STORES, INC.2. Number of present permit, if renewal application: N/A

Give present permit number

3. If corporation, give names and addresses of principal officers and manager in charge:

See paragraphs 4, 5 and 6 of supporting affidavit

4. If partnership, give names and addresses of all active partners:

N/A

5. If individually owned, give name and address of owner:

N/A

6. Names and certificate numbers of registered pharmacists employed, including employer, if a registered pharmacist:

Kenneth M. SwansonNo. 2600Patricia Ann CaswellNo. 2956

No.

No.

No.

Give name and certificate number of each

7. Names of all unregistered employees:

None8. Has the store the ^{18th} revision of the United States Pharmacopoeia? Yes Give serial number: 64003 334899. Has the store the ^{13th} edition of the National Formulary? Yes Give serial number: 20000 3099310. Does store keep a Poison Register (yes or no) Yes11. Does store keep a Record of Sales of Exempt Narcotics? (yes or no) Yes

APPLICATION FOR LICENSE

It is hereby certified, under oath, that the store has all the appliances listed below:

Suitable prescription files

Suitable refrigeration (if biological are stocked)

One Poison cabinet (for more dangerous drugs)

One Poison Register

One Narcotic Drug Cabinet

One exempt narcotic register

One prescription scale, sensitive to 1/4 grain

One dispensing scale, for large quantities

One set apothecary weights from 1/4 grain to 1 ounce

One set avoirdupois weights from 1/4 ounce to 2 pounds

One set metric weights from 10 mg to 50 gm

(Enter number before each of the following)

(Require number is indicated in parenthesis)

- 2 Stirring rods, glass or rubber (2) #2510
- 3 Test tubes (assorted sizes) (3) 5 x 5/8"
- 1 Pill tile, 10x12, glass or porcelain (1) #3190
- 1 Evaporating dishes or casserols, (porcelain or other suitable material) (1)
- 1 Apparatus for heating above
- 1 Glass percolator (any convenient size) (1)
- 1 Sieve (moderately fine) (1)

A reasonable amount of filter paper, litmus paper, powder paper, empty capsules, cork, ointment jars, bottles, pill and powder boxes, labels and distilled water.

13. And that proper sanitary conditions are maintained. The store is equipped with proper sanitary appliances, a detail of which follows:

- (a) Plumbing (sanitary) Yes
- (b) Towels Yes

- (c) Running water Yes
- (d) Lighting, etc. Yes

14. Signed: SNYDER'S DRUG STORES, INC.

Applicant: 14 Lloyd Dr. Bertha President

Address 1878 Hampshire Avenue, St. Paul, Minnesota

15. Subscribed and sworn to before me this 25th day of January, 1971

Louis W. Humphrey

Notary Public

Please Answer All Questions Carefully and Accurately

(All Licenses expire July 1st. Your Application for Renewal Must Be Filed Before June 30th.)

Graduated glass Apothecary (Set No. 1), at least eight (Fill in number after each size listed)

30 min.	1 - #60345	2 oz.	1 - #60345
60 min.	1 - #60345	4 oz.	1 - #60345
1/4 oz.	1 - #60345	6 oz.	1 - #60345
1/2 oz.	1 - #60345	16 oz.	1 - #60345
1 oz.	1 - #60345	32 oz.	

Graduated glass Metric (Set No. 2), at least eight (Fill in number after each size listed)

5 cc.	60 cc.
10 cc.	125 cc.
15 cc.	250 cc.
30 cc.	500 cc.
	1000 cc.

(One set with metric and apothecary graduations will suffice)

Mortars and Pestles, (glass), at least two (Fill in size and number)

4 oz. glass #3100M	oz. glass or porcelain
8 oz. glass #3100M	oz. glass or porcelain
oz. glass or porcelain	oz. glass or porcelain

Mortars and Pestles, Wedgewood, at least three

1-16 oz. Wedgewood #3100P	oz. Wedgewood
1-54 oz. Wedgewood #3100P	oz. Wedgewood
1-4 oz. Wedgewood #3100P	oz. Wedgewood

Spatulas, steel, at least three assorted sizes (Fill in size and number)

4 in. steel, No. 3451 (1)	in. steel, No.
6 in. steel, No. 3451 (1)	in. steel, No.
8 in. steel, No. 3451 (1)	in. steel, No.

Rubber or non-metallic, (assorted sizes), at least two

6 in. No. 3452 (1)	in. No.
4 in. No. 3452 (1)	in. No.

Funnels, glass, at least three assorted sizes (Fill in size and number)

2 oz. No. 2260 (1)	oz. No.
8 oz. No. 2260 (1)	oz. No.
16 oz. No. 2260 (1)	oz. No.

AFFIDAVIT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Lloyd D. Berkus (hereinafter called "Berkus") and Richard C. Johnson (hereinafter called "Johnson"), being duly sworn on oath, depose and say that:

1. This affidavit is given in support of, and to furnish additional information in connection with, an Application for Permit to operate a pharmacy or drugstore in the area outlined in red on EXHIBIT A to the sublease annexed hereto as EXHIBIT I and hereby made a part hereof (hereinafter called the "Pharmacy Area"), which is located in the premises commonly known and referred to as 715 East Broadway, City of Bismarck, County of Burleigh, State of North Dakota (hereinafter called the "Red Owl Store").

2. Berkus is the duly elected, acting and qualified President of Snyder's Drug Stores, Inc., a Minnesota corporation (hereinafter called "Snyders"). Johnson is the duly elected, acting and qualified Vice President and Secretary of Red Owl Stores, Inc., a Delaware corporation (hereinafter called "Red Owl"), and Secretary of Snyders.

3. Snyders is qualified and authorized to transact business in the State of North Dakota.

4. The names, addresses and principal officers of Snyder's are as follows:

Lloyd D. Berkus
1878 Hampshire
St. Paul, Minn. 55116
President

Lou Sachs

1700 West 26th Street
Minneapolis, Minn.
Sr. Vice President

William H. Smith

6116 Chowen Avenue
Minneapolis, Minn. 55410
Vice President

Leroy Kieffer

612 South Brimhall
St. Paul, Minn. 55106
Vice President

Joel Raffenbeul

242 - 13th Avenue S.
Hopkins, Minn. 55343
Vice President

Richard C. Johnson

5400 West 70th Street
Edina, Minn. 55435
Secretary

Sheldon V. Durtsche

2905 - 32½ Avenue N.E.
Minneapolis, Minn. 55418
Asst. Secretary

William C. Ferril

17225 - 24th Avenue N.
Wayzata, Minn. 55391
Treasurer

Orville G. McDonald

5808 Halifax Avenue S.
Edina, Minn. 55424
Asst. Treasurer

5. The names and addresses of the directors of Snyders are as follows:

Lloyd D. Berkus—1878 Hampshire, St. Paul, Minn.
55116

James H. Wille—Route 4, Box 56A, Excelsior, Minn.
55331

James E. Gottlieb—1654 Pinehurst, St. Paul, Minn.
55116

6. Irwin Livon, a pharmacist registered and in good standing in the State of Minnesota, is director of professional services for Snyders and is responsible for the purchase of all pharmaceuticals and the field supervision and maintenance of professional standards in all Snyders drugstores and pharmacy departments.

7. Kenneth Swanson, currently residing at 72 Knollwood Court, Faribault, Minnesota 55201, a pharmacist registered and in good standing in the States of Minnesota and North Dakota, is currently employed by Snyders and, upon issuance of a permit to operate a pharmacy in the Pharmacy Area, will be actively and regularly employed in and responsible for the management, supervision and operation of such pharmacy.

8. Snyders and its predecessor in interest owned and operated drugstores and pharmacies in the State of Minnesota since 1931.

9. Snyders currently operates 37 drugstores, seven pharmacy departments in other stores and has franchise agreements for the operation of five other drugstores and pharmacy departments in the States of Iowa, Michigan, Minnesota, South Dakota and Wisconsin.

10. Snyders currently employs 120 pharmacists, all of whom are registered and in good standing in the states in which they are employed.

11. Snyders is in compliance with all applicable pharmacy laws and regulations in all states in which it operates.

12. Snyders has 5,000 shares of common stock authorized and outstanding, all of which are owned by Red Owl. Snyders has no other class of stock authorized or outstanding.

13. As of January 31, 1970, there were 2,222 shareholders of Red Owl. It is not known whether any such shareholders are or were pharmacists registered and in good standing in the State of North Dakota.

14. The sublease between Red Owl and Family Center Drug Stores, Inc., a North Dakota corporation (hereinafter called "Family Center Drug"), dated June 14, 1968, as amended August 18, 1969, relating to the Pharmacy Area has been terminated and cancelled and Family Center Drug no longer has any rights thereunder.

15. The Snyder Franchise Agreement between Snyders and Family Center Drug dated June 14, 1968, relating to the Pharmacy Area has been terminated and cancelled, and Family Center Drug no longer has any rights thereunder.

16. Snyders will occupy the Pharmacy Area pursuant to the sublease annexed hereto as EXHIBIT I.

17. The floor plan of the Red Owl Store is annexed hereto as EXHIBIT II and hereby made a part hereof.

18. The Pharmacy Area will be secured from the rest of the Red Owl Store in accordance with the plan annexed hereto as EXHIBIT III and hereby made a part hereof.

19. Each pharmacist designated in paragraph 6 of the Application for Permit will have a key to the Red Owl Store.

20. No one other than said pharmacists will have a key to the Pharmacy Area.

/s/ Lloyd D. Berkus

/s/ Richard C. Johnson

Subscribed and sworn to before me this 25th day of January, 1971.

/s/ Aimee M. Murphy

Notary Public

My Commission Expires Feb. 20, 1975.

NOTE: Sublease, Exhibit I, and Diagram, Exhibit A, which were attached to the Application have been omitted from this appendix but are part of the record.

INVESTIGATION REPORT

Re: Snyder Drug Store Application

STATE OF NORTH DAKOTA)

) SS:

COUNTY OF BURLEIGH)

Al Doerr, being first duly sworn, deposes and says as follows:

1. That he is the Secretary of the North Dakota State Board of Pharmacy; and makes this affidavit as an investigation report in such capacity, regarding the application of Snyder Drug Stores, Inc., for a pharmacy permit.

2. That he has personally inspected the proposed location of the Snyder Drug Store, such being given as 715 East Broadway Avenue, Bismarck, North Dakota; and found such address to be a large Red Owl food and general merchandise store.

3. That within said store he found a wall of the store containing a large sign indicating "Drugs," which he believes to be a violation of State law.

4. Near the "Drug" sign, he found an area apparently intended to be used as a drug area with an open entry, doorway, and two large (25-35 feet long) windows covered with a blue cloth curtain.

5. That the only observable restroom near the drug area was a restroom in the corner of the building, apparently used by all customers of the store, including the restaurant, which restroom was locked and had a sign on the door, indicating that the key could be found in the cosmetics department.

6. That from my observation, it appeared that the "drug store" would not have its own receiving and storage area, but would have a receiving and storage area in common with the groceries and general merchandise departments.

7. That the location of the drug store was within the supermarket without a separate entrance or exit.

8. That from examination of the premises, it could not be determined that physical safeguards, if any, were planned for the protection of the public from dangerous or narcotic drugs.

9. That during the inspection, affiant noticed certain drug products already being sold by Red Owl, including Bromo-Selzer, Cope, Bufferin, Sominex, Anacin, No-Doz, Excederin, and Snyder's Extra Strength Pain Reliever.

10. That the application submitted by Snyder Drug Stores, Inc., and supporting material, indicates that all of the common stock of Snyder Drug Stores, Inc., is owned by Red Owl Stores, a corporation; and that Red Owl has

2,222 shareholders; and that it is unknown if any of the 2,222 shareholders are registered pharmacists in North Dakota.

11. That affiant has presented this information to the Board of Pharmacy for their consideration of the application of Snyder Drug Store, Inc., for a pharmacy permit.

Dated this 22nd day of March, 1971.

/s/ Al Doerr

Subscribed and sworn to before me this 22nd day of March, 1971.

/s/ A. William Lucas
Notary Public
Burleigh County,
North Dakota

My commission expires 6/24/71

**EXCERPT FROM PROCEEDINGS, NORTH DAKOTA
STATE BOARD OF PHARMACY, MONDAY,
MARCH 22, 1971**

It was moved by Mrs. Elizabeth Getz that the application of Snyder's Drug Stores, Inc., for a permit to operate a pharmacy at 715 East Broadway in the City of Bismarck, North Dakota, be denied on the grounds and for the reasons that the application on its face shows a non-compliance with the requirements of the North Dakota Century Code, relating to ownership and control of a corporate applicant; and, further, that the proposed site and location thereof are defective, in that there is no provision for an adequate storage or receiving area separate from those used by other businesses operated within the structure; that the provision of washrooms and restrooms

is inadequate, in that investigation shows the same are kept locked, and not available to the general public; that the proposed location of the facility within a supermarket complex, with no separate entrance or exit for access to the pharmacy as a separate entity, does not provide a sufficient safeguard for the integrity and protection of the dangerous or narcotic compounds located therein; and, further, that based upon the recent North Dakota Supreme Court decision in Family Center Drug Stores, Inc., vs. the North Dakota State Board of Pharmacy, the application does not conform to statutory requirements, and must be denied.

This motion was seconded by Jim Irgens, and was unanimously adopted by the members of the board.

**ADMINISTRATIVE FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

APPLICATION FOR PERMIT TO OPERATE A PHARMACY OR DRUG STORE AT 715 EAST BROADWAY IN THE CITY OF BISMARCK, NORTH DAKOTA, BY SNYDER DRUG STORES, INC.

The application by Snyder Drug Stores, Inc., for a permit to operate a pharmacy or drug store at 715 East Broadway in the City of Bismarck, North Dakota, having been presented to the State Board of Pharmacy on the 22nd day of March, 1971, and the Secretary of the State Board of Pharmacy having made an investigation of said application; and the board, after examining the investigation report, the application and supporting material, and other material submitted to the board; and the board being fully advised in the premises, it now makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1.

That the proposed location of the Snyder Drug Store will be at 715 East Broadway Avenue, Bismarck, North Dakota; and will be within the large Red Owl food and general merchandise store; and that the drug store will not have a separate entrance or exit, but will use the entrances and exits provided for the Red Owl food and general merchandise store.

2.

That the area within the supermarket apparently intended to be used as a drug store is an area with an open entry doorway, and with two large windows covered with a blue cloth curtain.

3.

That the drug store area will not have its own receiving and storage area, but will share a receiving and storage area with the grocery and general merchandise departments of the Red Owl supermarket store.

4.

That the only observable restroom near the drug area was a restroom in the corner of the building, apparently used by all customers of the store, including the restaurant; and that said restroom is locked and had a sign on the door indicating that the key could be found in the cosmetic department.

5.

That within the Red Owl food store, there is presently a large sign on the wall, indicating "Drugs," and that the Red Owl store is presently selling certain drug products.

That Snyder Drug Stores, Inc., is a Minnesota corporation; and that all of the common stock of Snyder Drug Stores, Inc., is owned by Red Owl Stores, Inc., a Delaware corporation; and that Red Owl Stores, Inc., has 2,222 shareholders; and that the applicant does not know if any of the 2,222 shareholders are registered pharmacists in the State of North Dakota.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the board makes the following conclusions of law:

1.

That the corporate applicant Snyder Drug Stores, Inc., has failed to comply with subsection 5 of Section 43-15-35, N.D.C.C., which provides that if the applicant is a corporation, that the majority of the stock must be owned by a registered pharmacist in good standing, actively and regularly employed in and responsible for the management, supervision, and operation of the pharmacy.

2.

That the present store located at 715 East Broadway Avenue, Bismarck, North Dakota, is in violation of State law by having a "Drug" sign prominently displayed on a wall within the store; and that they are selling a large number of drug items at the present time.

3.

That the drug store proposed by the applicant does not have the necessary and required physical safeguards for the protection of the public from dangerous and narcotic drugs; does not have adequate restroom facilities;

does not have an adequate receiving and storage area for the protection of the public, as required by the rules and regulations of the State Board of Pharmacy.

From the findings of fact and conclusions of law set forth herein, the State Board of Pharmacy of the State of North Dakota does conclude that the pharmacy or drug store of which a permit has been requested by Snyder Drug Stores, Inc., will not be conducted in full compliance with existing laws, and with the rules and regulations established by the board; and does not comply with Section 43-15-35, subsection 5, of the North Dakota Century Code, as amended, now, therefore:

It is hereby ORDERED that the application of Snyder Drug Stores, Inc., be, and it is hereby, denied.

Dated this 22nd day of March, 1971.

North Dakota State Board of Pharmacy

By /s/ Al Doerr

Its Secretary

NOTICE OF APPEAL

TO THE NORTH DAKOTA STATE BOARD OF PHARMACY AND CONMY, CONMY, ROSENBERG, LUCAS AND OLSON, ITS ATTORNEYS; AND TO HELGI JOHANNESON, NORTH DAKOTA ATTORNEY GENERAL, RESPONDENTS:

YOU WILL PLEASE TAKE NOTICE that the appellant in the above entitled action in accordance with Section 43-15-41 of the North Dakota Century Code hereby appeals to the District Court of Burleigh County, North Dakota, from that certain order of the North Dakota State Board of Pharmacy dated March 22, 1971, denying the appellant's Application for Permit dated January 25, 1971,

to operate a pharmacy or drugstore in Bismarck, North Dakota. A copy of the Order is attached hereto, marked as Exhibit "A" and made a part hereof.

YOU WILL ALSO TAKE NOTICE That hereto attached are the appellant's Specifications of Errors.

Dated this 12th day of April, 1971.

Snyder's Drug Stores, Inc.

By /s/ Mart R. Vogel

One of Its Attorneys

EXHIBIT "A"

Excerpt from Proceedings, North Dakota State Board of Pharmacy, Monday, March 22, 1971. Was previously printed earlier in this appendix, see p. 11.

SPECIFICATIONS OF ERRORS

The petitioner's appeal from the decision of the North Dakota State Board of Pharmacy denying its application for a permit to operate a pharmacy in the City of Bismarck, North Dakota, is based upon the following grounds:

I

Section 43-15-35(5) of the North Dakota Century Code, on which the Board of Pharmacy relied in denying the petitioner's application for a pharmacy permit, is unconstitutional in that it violates the Constitution of the United States in the following respects, among others:

1. The statute violates Amendment 14, Section 1 of the United States Constitution which states that no State shall deny to any person within its jurisdiction the equal protection of the laws.

2. The statute violates Amendment 14, Section 1, of the United States Constitution which states that no person shall deprive any person of his liberty or property without due process of law.

II.

Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates the provision of the Constitution of the State of North Dakota in the following respects, among others:

1. The statute violates Section 11 of the North Dakota Constitution, which provides that all laws of a general nature shall have uniform operation.

2. The statute violates Section 20 of the North Dakota Constitution which states that no citizen or class of citizens shall be granted privileges or immunities which shall not be granted to all citizens upon the same terms.

III.

The finding of the State Board of Pharmacy that the proposed site and location are defective in that there is no provision for an adequate storage or receiving area separate from those used by other businesses operated within the structure is not supported by the evidence and is not in accordance with law.

IV.

The finding of the State Board of Pharmacy that the provision for washroom and rest rooms is inadequate in that the same are kept locked and are not available to the general public is not supported by the evidence and is not in accordance with law.

V.

The finding of the State Board of Pharmacy that the proposed location of the facility within a supermarket complex does not provide a sufficient safeguard for the integrity and protection of dangerous or narcotic drug compounds located therein is not supported by the evidence and is not in accordance with the law.

Dated this 12th day of April, 1971.

Snyder's Drug Stores, Inc.

By /s/ Mart R. Vogel

One of Its Attorneys

(Undertaking on Appeal Omitted.)

CERTIFICATION OF RECORD ON APPEAL

Comes now Al Doerr, as Secretary of the North Dakota State Board of Pharmacy; and hereby certifies to the District Court of Burleigh County, North Dakota, that the following documents as listed hereon and attached hereto constitute the record on appeal of the above captioned matter; and that such comprise the entire file of the North Dakota State Board of Pharmacy, with the exception of certain items of correspondence.

That a listing of such record is as follows:

1. Application for pharmacy permit by Snyder's Drug Stores, Inc., dated January 25, 1971.
2. Affidavit of Lloyd D. Berkus and Richard C. Johnson, and Exhibits I, A, II, and III in support thereof.
3. Investigation report by Al Doerr, dated March 22, 1971.
4. Excerpt of Proceedings of North Dakota State Board of Pharmacy, Monday, March 22, 1971.

5. Administrative Findings of Fact, Conclusions of Law, and Order, dated March 22, 1971.

Dated this 11th day of May, 1971.

/s/ Al Doerr

Subscribed and sworn to before me this 11th day of May, 1971.

/s/ A. William Lucas

Notary Public

Burleigh County, North Dakota

My commission expires 6-24-71

Conmy, Conmy, Rosenberg, Lucas & Olson

By /s/ A. William Lucas

Attorneys for Appellee

420 Fourth Street, Box 1398

Bismarck, North Dakota

MOTION FOR SUMMARY JUDGMENT

COMES NOW THE APPELLANT in the above entitled action and moves the Court for a summary judgment in favor of the appellant and against the respondent reversing the order of the North Dakota State Board of Pharmacy, in which the Board denied the appellant's application for a permit to operate a pharmacy or drugstore in Bismarck, North Dakota. This motion is made on the grounds that there is no genuine issue as to any material fact and that the appellant is entitled to a judgment as a matter of law.

If summary judgment is not rendered in appellant's favor upon the whole case or for all the relief asked and a hearing on the appeal is necessary, the appellant moves the Court, at the hearing on the motion, by examining the

pleadings and the evidence before it and by interrogating counsel, to ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

- (a) The files and record in this matter;
- (b) The attached Affidavit of Lloyd D. Berkus;
- (c) The Affidavit of C. Nicholas Vogel.

Dated this 16th day of November, 1971.

/s/ Mart R. Vogel
 Of Wattam, Vogel, Vogel &
 Peterson
 609½ First Avenue North
 Fargo, North Dakota
 Attorneys for Appellant

AFFIDAVIT

STATE OF MINNESOTA)

) ss

COUNTY OF HENNEPIN)

Lloyd D. Berkus, being first duly sworn, deposes and says:

I

I am the duly elected, acting and qualified president of Snyder's Drug Stores, Inc., a Minnesota corporation, the above named Appellant. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of Appellant's motion for summary judgment.

II.

The area for the proposed pharmacy in the Red Owl Family Center in Bismarck, North Dakota, will be shut off and segregated from the main store by folding doors which will be secured and locked whenever a pharmacist is not present. Narcotic drugs will be kept in the narcotic drugs cabinet, which will be locked when a pharmacist is not present. The public will not have access to any dangerous, narcotic or prescription drugs except through a pharmacist who will be present at all times when the area is opened to the public.

III.

Bathroom facilities for men and for women will be immediately adjacent to the planned drug area and will be available to customers if a permit is granted.

IV.

The planned pharmacy facilities in the Red Owl Family Center to be operated by Snyder's Drug Stores, Inc., are identical to the facilities which Family Center Drug Store planned to operate in the same store until its application for a permit was denied by the State Board of Pharmacy in 1969. The application was rejected by the Board of Pharmacy on the grounds, among others, that the restroom facilities, the storage and receiving areas and the provisions for protecting the public from narcotic drugs were inadequate. In an appeal from the Board's order denying the application, Judge Fredricks of the Burleigh County District Court specifically found that there was no evidence supporting the Board's findings in these areas. A copy of the Court's Findings of Fact, Conclusions of Law and Order is attached to this affidavit and marked as Exhibit "I".

Dated this 15 day of September, 1971.

/s/ Lloyd D. Berkus

Subscribed and sworn to before me this 15th day of September, 1971.

/s/ Aimee M. Murphy

(Seal)

Notary Public

Hennepin County, Minnesota

My commission expires: Feb. 20, 1975.

AFFIDAVIT

C. Nicholas Vogel, being first duly sworn, deposes and says:

I.

I am 28 years old and a lifelong resident of North Dakota. I have personal knowledge of the matters herein-after referred to, and make this affidavit in support of the plaintiff's motion for summary judgment.

II.

I have shopped many times at the K-Mart store located on the south side of Fargo, North Dakota, and have purchased there such packaged medicines as Dristan, Chloroseptic, and Bayer Aspirin. In addition, I know the store has available for sale such packaged medicines as Excedrin, Anacin, Bromo-Selzer, Bufferin, Sominex, and No-Doz. I have never seen a pharmacist in or near the area where the medicines are sold, and it does not appear to be under the management or control of a pharmacist. Likewise, the K-Mart store at Grand Forks, North Dakota, has the same or similar medicines for sale at public counters.

III.

I have also shopped many times at the downtown drugstores in Fargo, including the Broadway Pharmacy and White Drug. Both of these drugstores sell numerous non-medical goods, including magazines, toothpaste, gifts, small appliances and cosmetics. In both stores many packaged medicines are displayed for sale on shelves directly accessible by the public. The drug areas in both stores are located toward the rear of the stores, and in both there is a raised counter behind which the pharmacist usually works, the bulk and prescription drugs are kept and the prescriptions themselves are compounded. In the Broadway Pharmacy, access to the area behind the counter can be obtained by going through an open doorway south of the raised counter. At the White Drug, there is a low swinging door at the south end of the raised counter which gives access to the restricted area.

Dated this 22d day of September, 1971.

/s/ C. Nicholas Vogel

Subscribed and sworn to before me this 22d day of September, 1971.

/s/ Carol Reinpold

Notary Public

Cass County, North Dakota

My commission expires: 12-6-76.

RETURN TO MOTION FOR SUMMARY JUDGMENT

Comes now the appellee, North Dakota State Board of Pharmacy, and hereby resists the motion for summary judgment of the appellant, Snyder's Drug Stores, Inc., and hereby submits the following as its return to the

motion for summary judgment and memorandum concerning the facts and law involved.

The principal issue between the parties on this appeal according to the appellant is the constitutionality of Section 45-15-35 (5) of the North Dakota Century Code. This involves the question of whether there is a substantial relation between majority ownership by licensed pharmacist of a drug store and the public interest, health, and welfare.

NOTE: The remainder of the Return to Motion included argument and brief material which is omitted from this appendix but is a part of the record.

Respectfully submitted,

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys for Appellee
420 North Fourth Street
P. O. Box 1398
Bismarck, North Dakota 58501

By /s/ A. William Lucas

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

This is an appeal from an order of the North Dakota State Board of Pharmacy dated March 22, 1971, denying the appellant's Application for a Permit dated January 25, 1971, to operate a pharmacy or drugstore in Bismarck, North Dakota. Appellant served and filed a notice of appeal dated April 12, 1971, with specification of errors and undertaking on appeal to the District Court of the State of North Dakota. Thereafter, on November 16, 1971, the appellant moved for summary judgment. Attached to the motion were affidavits of Lloyd D. Berkus and

C. Nicholas Vogel, as well as the appellant's brief in support of motion for summary judgment. On December 3, 1971, the respondent served its return to the appellant's motion and on that same date the case was argued to the District Court.

After examining the pleadings, affidavits, records and files in the case, and having studied the proofs and briefs and considered the arguments of counsel and being fully advised in the premises, the Court now makes the following findings of fact, conclusions of law and order for judgment:

FINDINGS OF FACT

I.

The appellant is a Minnesota corporation qualified and authorized to transact business in the State of North Dakota. The corporation has 5,000 shares of common stock authorized and outstanding, and all of these shares are owned by Red Owl Stores, Inc., a Delaware corporation.

I.

As of January 31, 1970, there were 2,222 shareholders of Red Owl. A majority of the Red Owl stock is not owned by registered pharmacists.

III.

On January 25, 1971, Snyder's Drug Stores, Inc., applied for a permit to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

IV.

The appellant's application and attached affidavits established that Kenneth Swanson, a pharmacist registered

and in good standing in the State of North Dakota, would be actively and regularly employed in and responsible for the management, supervision and the operation of the pharmacy once the permit was granted.

V.

The appellant's application, the blueprints for the planned pharmacy and the uncontested affidavits attached to the application and to the appellant's motion for summary judgment establish that the planned pharmacy area will include folding doors which will shut off the drug area within the Family Center store whenever a registered pharmacist is not present. Access to the planned area by the public will be available only when there is a registered pharmacist in attendance, and only registered pharmacists will have a key giving them access to the pharmacy area. The planned facility will have a narcotic drug cabinet which will be locked whenever a pharmacist is not present.

VI.

The plaintiff's application for a permit, the blueprints for the planned pharmacy area and the affidavits attached to the application and to the motion for summary judgment establish that bathroom facilities for both men and women are available just a few feet east of the planned drug area, that proper plumbing, running water, towels and lighting will be provided in the planned area and that the toilet facilities will be made readily available to pharmacy customers if the permit is granted.

VII.

The appellant's application for a permit and the attached blueprints establish that there will be a receiving area immediately behind the pharmacy area which will

be accessible from the outside of the store and that there will be storage facilities both in the restricted drug area and immediately adjacent to the restricted area.

VIII.

The appellant's application for a permit establishes that if a permit is granted, the pharmacy will be conducted in full compliance with the North Dakota Century Code, with existing laws, and with the valid regulations of the Board of Pharmacy.

IX.

The plaintiff's application for a permit was denied by The North Dakota Board of Pharmacy on March 22, 1971. On April 12, 1971, within the allowed 30 day period, the appellant filed its notice of appeal.

X.

At the present time there is available for sale in the Red Owl Family Center various packaged drug remedies available without prescription such as Bufferin, Sominex, Anacin, Excedrin and Bromo Seltzer. Widely advertised packaged medicines like these are being sold in large supermarkets throughout the State of North Dakota, including the K-Mart stores in Fargo and Grand Forks, without a registered pharmacist being present.

XI.

The drug stores presently operating in the State of North Dakota, including the Broadway Pharmacy and White Drug Store in Fargo, North Dakota, sell numerous non-medical goods. Many packaged medicines are displayed for sale on shelves directly accessible to the public. The drug areas of both stores are located behind raised counter areas at one end of the store and access to these

areas is accessible through doorways which are open when pharmacists are present in the area.

XII.

The planned pharmacy facilities in the Red Owl Family Center to be operated by the appellant are identical to the facilities which Family Center Drug Store planned to operate in the same store until its application for a permit was denied by the State Board of Pharmacy in 1969. Among the reasons cited for the denial of this earlier application was the assertion that the restroom facilities, storage and receiving areas and the provisions for protecting the public from narcotic drugs were inadequate. These findings were appealed to the Burleigh County District Court and the Court found that there was no evidence supporting the Board's findings in these areas.

XIII.

The board of Pharmacy has not issued any regulations specifying the standards for storage in receiving areas in planned pharmacies and the published rules and regulations of the Board of Pharmacy do not at present require pharmacies to provide open toilet facilities to the public.

XIV.

The applicant did not comply with subsection 5 of Section 43-15-35 of the North Dakota Century Code requiring that a majority of the stock of corporate applicants be owned by registered pharmacists in good standing, actively and regularly employed in and responsible for the management, supervision and operation of the proposed pharmacy.

From the foregoing findings of fact, the Court now makes his conclusions of law:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter in this action.

II.

There is no genuine issue of material fact actually and in good faith controverted by the parties.

III.

The finding of the State Board of Pharmacy that the proposed site and location of the planned pharmacy are defective because of alleged inadequate storage and receiving areas is not supported by the evidence and is not in accordance with law.

IV.

The finding of the State Board of Pharmacy that the provisions in the planned pharmacy for washroom and restroom facilities are inadequate is not supported by the evidence and is not in accordance with law.

V.

The finding of the State Board of Pharmacy that the provisions for the planned pharmacy do not include necessary and required physical safeguards for the protection of the public from dangerous and narcotic drugs is not supported by the evidence and is not in accordance with law.

VI.

The finding and conclusion of the State Board of Pharmacy that Red Owl Stores, Inc., is in violation of State law by having a drug sign permanently displayed within

the present Family Center store is not relevant to the present action since the present applicant for a permit is Snyder Drug Stores, Inc.; and not Red Owl Stores, Inc.

VII.

The medicines currently being sold in the existing Red Owl Store are proprietary medicines exempted from control by the State Board of Pharmacy by Section 43-15-02 of the North Dakota Century Code.

VIII.

The State Board of Pharmacy is collaterally estopped from questioning the adequacy of the provisions for narcotic drugs and for washroom facilities since these issues were determined adversely to the Board in earlier litigation between the Board and the Family Center Drug Store, Inc., and since the issues and evidence in this earlier litigation were identical to the issues and evidence in the present litigation.

IX.

The requirement that a majority of the stock of a corporate applicant for a permit to operate a pharmacy in the state of North Dakota be owned by registered pharmacists in good standing in North Dakota is not a reasonable requirement; it does not bear a definite relation to the public health, safety, and welfare and is not expedient and necessary for the protection of public health, public safety, public morals or public welfare. The requirement has no real, substantial relation to public objects which the government may legally accomplish, since it adds nothing to the legitimate regulation of drugs, pharmacists and pharmacies in the state of North Dakota, all of which are already closely and directly regulated by various federal and state statutes and agencies.

X.

The exemption from the requirements of subsection 5 of Section 43-15-35 of the North Dakota Century Code of all those who held pharmacy permits on July 1, 1963, and all hospital pharmacies creates a classification which is not reasonably necessary to effect the purpose of the law. The effect of the exemption is to create a privileged class and to grant to that class an immunity which has not been granted on the same terms to all citizens of the state.

XI.

Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates Amendment 14, Section 1 of the United States Constitution, prohibiting a state from denying to any person within its jurisdiction the equal protection of the law and from depriving any person of his liberty or property without due process of law.

XII.

Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates both Section 11 of the North Dakota Constitution, which states that all laws of a general nature shall have uniform operation, and Section 20 of the North Dakota Constitution, which states that no citizen or class of citizens shall be granted privileges or immunities which shall not be granted to all citizens upon the same terms.

XIII.

The appellant is entitled to have issued to it by the respondent a permit to operate pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 30th day of December, 1971.

By the Court:

/s/ M. C. Fredricks

SUMMARY JUDGMENT

The motion of the appellant, Snyder's Drug Stores, Inc., for a summary judgment pursuant to Rule 56 of the North Dakota Rules of Civil Procedure having been presented and the Court, being fully advised, having found that the appellant, Snyder's Drug Stores, Inc., was entitled to a summary judgment as a matter of law, NOW, THEREFORE

IT IS ORDERED, ADJUDGED AND DECREED:

I.

That the motion of the appellant Snyder's Drug Stores, Inc., for summary judgment against the respondent North Dakota State Board of Pharmacy be and the same is hereby granted.

II.

That the respondent issue to the appellant a permit to operate pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

Witness the Honorable M. C. Fredricks, Judge of the District Court, and my hand and seal of this Court the 6th day of January, 1972.

/s/ Thora Dennis

Clerk of District Court

NOTICE OF APPEAL

TO: Snyder's Drug Stores, Inc., Wattham, Vogel, Vogel and Peterson, Attorneys for Snyder's Drug Stores, Inc., and the Clerk of the District Court:

PLEASE TAKE NOTICE that the above named appellee/appellant North Dakota State Board of Pharmacy hereby appeals to the Supreme Court of the State of North Dakota, from the summary judgment rendered and entered in said action on the 6th day of January, 1972, in favor of the appellant/respondent Snyder's Drug Stores, Inc. and against the appellee/appellant North Dakota State Board of Pharmacy and that said appeal is taken from the whole thereof.

YOU WILL ALSO TAKE NOTICE that hereto attached are the appellee/appellant's Specifications of Error.

Dated at Bismarck, North Dakota, this 4th day of April, 1972.

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys for the Appellee/Appellant
North Dakota State Board of Pharmacy
207 MDU Office Building,
P. O. Box 1398
Bismarck, North Dakota 58501

By /s/ A. William Lucas
A Member of said Firm

(Undertaking on Appeal Omitted.)

SPECIFICATIONS OF ERROR

Comes now the appellee/appellant in the above entitled matter and alleges the following as specifications of error on appeal to the Supreme Court of the State of North Dakota:

1.

That the Court erred in holding that the requirement of Subsection 5 of Section 43-15-35 of the North Dakota Century Code providing that a majority of the stock of a corporate applicant for a permit to operate a pharmacy in the State of North Dakota be owned by a registered pharmacist in good standing in North Dakota is not a reasonable requirement or that it is unconstitutional; that it does not bear a definite relation to the public health, safety, and welfare and is not expedient and necessary for the protection of public health, public safety, public morals or public welfare. The Court erred in holding that the requirement has no real, substantial relation to public objects which the government may legally accomplish, since it adds nothing to the legitimate regulations of drugs, pharmacists and pharmacies in the State of North Dakota.

2.

That the Court erred in holding that Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates Amendment 14, Section 1 of the United States Constitution, prohibiting a state from denying to any person within its jurisdiction the equal protection of the law and from depriving any person of his liberty or property without due process of law.

3.

The Court erred in holding that Section 43-15-35(5) of the North Dakota Century Code is unconstitutional in that it violates both Section 11 of the North Dakota Constitution, which states that all laws of a general nature shall have uniform operation, and Section 20 of the North Dakota Constitution, which states that no citizen or class of citizens shall be granted privileges or immunities which shall not be granted to all citizens upon the same terms.

4.

That the Court erred in holding that the exemption from the requirements of Subsection 5 of Section 43-15-35 of the North Dakota Century Code of all those who held pharmacy permits on July 1, 1963, and all hospital pharmacies creates a classification which is not reasonably necessary to effect the purpose of the law.

5.

That the Court erred in holding that there was no genuine issue of fact before the Court on the motion for summary judgment heard by the Court resulting in the summary judgment herein appealed.

6.

That the Court erred in holding the following for the reason that said matters were questions of fact which were not properly before the Court on a motion for summary judgment and should not have been decided on a motion for summary judgment:

(a) That the finding of the State Board of Pharmacy that the proposed site and location of the planned pharmacy are defective because of alleged inadequate storage and receiving areas is not supported by the evidence and is not in accordance with law.

(b) That the finding of the State Board of Pharmacy that the provisions in the planned pharmacy for washroom and restroom facilities are inadequate is not supported by the evidence and is not in accordance with law.

(c) That the finding of the State Board of Pharmacy that the provisions for the planned pharmacy do not include necessary and required physical safeguards for the protection of the public from dangerous and narcotic drugs is not supported by the evidence and is not in accordance with law.

7.

That the Court erred in holding that the findings and conclusion of the State Board of Pharmacy that Red Owl Stores, Inc., is in violation of state law by having a drug sign permanently displayed within the present Family Center Store is not relevant to the present action since the present applicant for a permit is Snyder Drug Stores, Inc., and not Red Owl Stores, Inc.

8.

That the Court erred in holding that medicines currently being sold in the existing Red Owl Store are proprietary medicines exempted from control by the State Board of Pharmacy by Section 43-15-02 of the North Dakota Century Code.

9.

That the Court erred in holding that the State Board of Pharmacy is collaterally estopped from questioning the adequacy of the provisions for narcotic drugs and for washroom facilities since these issues were determined adversely to the Board in earlier litigation between the Board and the Family Center Drug Store, Inc.

10.

That the Court erred in holding that the appellant/respondent Snyder's Drug Stores, Inc. is entitled to have issued to it by the appellee/appellant a permit to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota, after finding as a fact that the applicant did not comply with Subsection 5 of Section 43-15-35 of the North Dakota Century Code requiring that a majority of the stock of corporate applicants be owned by a registered pharmacist in good standing, actively and regularly employed in and responsible for the management, supervision and operation of the proposed pharmacy.

11.

That the Court erred in holding that the appellant/respondent Snyder's Drug Stores, Inc. is entitled to have issued to it by the appellee/appellant a permit to operate a pharmacy in the Red Owl Family Center in Bismarck, North Dakota.

Dated at Bismarck, North Dakota, this 4th day of April, 1972.

Conmy, Conmy, Rosenberg, Lucas & Olson
Attorneys for the Appellee/Appellant
North Dakota State Board of Pharmacy
207 MDU Office Building,
P. O. Box 1398
Bismarck, North Dakota 58501

By /s/ A. William Lucas
A Member of said Firm

NOTE: The opinion of the Supreme Court of North Dakota is reported at 202 N.W.2d 140, and is printed in the Petition for Writ of Certiorari on page 17.

ORDER FOR JUDGMENT ON REMITTITUR

WHEREAS, on the 6th day of January, 1972, summary judgment was entered in the above entitled action in favor of the appellant, and against the respondent, and

WHEREAS, the respondent perfected an appeal directly from said judgment to the Supreme Court of the State of North Dakota, and,

WHEREAS, by its decision the Supreme Court affirmed and in part reversed the summary judgment, holding that Section 43-15-35(5) of the North Dakota Century Code violates the due process clause of Section 1 of the Fourteenth Amendment to the United States Constitution, but also ruling that an administrative hearing on the appellant's application should be held pursuant to the Administrative Agencies' Practice Act,

NOW, THEREFORE, upon application of Wattam, Vogel, Vogel & Peterson, attorneys for the appellant, for a judgment in conformity with the mandate of the Supreme Court, it is hereby

ORDERED, ADJUDGED AND DECREED that Section 54-15-35(5) of the North Dakota Century Code is unconstitutional and of no force and effect, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that within sixty days from the date hereof the pharmacy board conduct an administrative hearing on the appellant's application for a pharmacy permit to determine whether, apart from the ownership requirement, the appellant is qualified to receive a permit to operate a pharmacy under North Dakota law and the regulations of the North Dakota Board of Pharmacy, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall recover its costs and disbursements.

Dated this 29th day of December, 1972.

By the Court:

/s/ M. C Fredricks

JUDGMENT ON REMITTITUR

Judgment in favor of plaintiff in the amount of Judgment on Remittitur rendered on the 4th day of January, 1973, in District Court was entered in Judgment Book No. BBJ, page no. 244 in the office of the Clerk of District Court of Burleigh County at Bismarek, North Dakota on the 4th day of January, 1973.

/s/ Thora Dennis

Clerk of District Court